

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Alliance Contact Services, <i>et al.</i>	)	
	)	CG Docket No. 02-278
Petition for Declaratory Ruling that the	)	DA 05-1346
FCC Has Exclusive Regulatory Jurisdiction	)	
Over Interstate Telemarketing	)	

**COMMENTS OF CONSUMER BANKERS ASSOCIATION  
IN SUPPORT OF JOINT PETITION**

The Consumer Bankers Association (“CBA”)<sup>1</sup> supports the Joint Petitioners’ request for a declaratory ruling that would end the growing chaos of inconsistent state regulation of interstate telemarketing calls. As the Joint Petition comprehensively explains, this Commission’s plenary authority to regulate such calls is firmly grounded in the Communications Act of 1934 and the Telephone Consumer Protection Act (“TCPA”).<sup>2</sup> Accordingly, preemption of state regulation of interstate telemarketing already is mandated by Congress and does not require proof that specific state laws are inconsistent with the TCPA or this Commission’s rules.

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<sup>1</sup> The Consumer Bankers Association was founded in 1919 and is a not-for-profit trade association that provides leadership and representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. The CBA develops policy that affects financial institution retail products and services. CBA members include most of the nation’s largest bank holding companies and hold two-thirds of the industry’s total assets. CBA is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer finance (auto, home equity and education), retail electronic commerce, small business services, and community development.

<sup>2</sup> Alliance Contact Services et al. Joint Petition for Declaratory Ruling that the FCC Has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing, CG Docket No. 02-278, DA 05-1346 (Apr. 29, 2005) (“Joint Petition”).

Inconsistency between state and federal law *is*, however, the basis upon which the Commission invited affected persons to file piecemeal requests for preemption of particular state telemarketing requirements; and the CBA, like other petitioners, has attempted to follow the Commission's guidance in this matter.<sup>3</sup> Pursuant to the Commission's invitation, the CBA filed two petitions for declaratory ruling to preempt certain provisions of the telemarketing statutes and rules of Indiana and Wisconsin, in which the CBA explained in detail the inconsistencies between those provisions and federal law.<sup>4</sup> The CBA has since responded to petitions to dismiss those requests, filed additional comments in support of its petitions and responded to questions from the Consumer and Governmental Affairs Bureau. The CBA now has pursued the Commission's prescribed preemption procedure for eight months.

Undoubtedly, the relief requested in the Joint Petition would most efficiently resolve the issues posed by contradictory state regulation of interstate telemarketing. However, for the reasons stated herein, the Commission also should grant the more limited relief requested by the CBA and should do so without further delay.

**I. THE RELIEF REQUESTED BY THE CBA CAN BE GRANTED WITHOUT FIRST ADDRESSING THE BROADER JURISDICTIONAL ISSUES RAISED IN THE JOINT PETITION**

As the Joint Petitioners correctly point out, preemption of state regulation of interstate telemarketing may be accomplished in two ways. First, the Commission can simply acknowledge that Congress has made federal regulatory jurisdiction over interstate telemarketing

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<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14064-65 ¶ 84 (2003) (“*2003 TCPA Order*”).

<sup>4</sup> Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code, CG Docket No. 02-278 (Nov. 19, 2004); Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code, CG Docket No. 02-278 (Nov. 19, 2004).

exclusive. Second, the Commission can preempt specific provisions of individual state telemarketing laws on the ground that those provisions are in conflict with the TCPA and the Commission's telemarketing rules.<sup>5</sup>

The Joint Petitioners make a compelling case for the first approach. The Commission can grant the CBA's pending petitions, however, regardless of how it rules on the question of plenary federal jurisdiction over interstate telemarketing. As the pending CBA petitions show, and as the CBA's comments filed today in further support of those petitions amply demonstrate, the provisions of Indiana and Wisconsin law described in the pending CBA petitions are flatly inconsistent with federal law and subject the CBA's members to "multiple, conflicting regulations" of the kind the Congress and this Commission have chosen to avoid.<sup>6</sup> Accordingly, the jurisdictional issue raised in the Joint Petition is logically independent of the CBA's case for conflict preemption and need not be addressed before the CBA's petitions are granted.

## **II. FURTHER DELAY IN GRANTING THE CBA PETITIONS WILL HARM THE LEGITIMATE INTERESTS OF THE CBA'S MEMBERS**

In the eight months since the CBA's petitions for declaratory ruling were filed, Indiana and Wisconsin have repeatedly reconfirmed their intention to apply their restrictive telemarketing laws to interstate calls. Notably, these states have vigorously opposed the CBA petitions and have interposed meritless "sovereign immunity" claims in an attempt to secure their dismissal. This expenditure of governmental resources leaves no doubt that the two states will bring enforcement actions against interstate telemarketers that place calls to those states in reliance on federal law. The threat of such enforcement actions creates an atmosphere of risk and uncertainty that the Commission should dispel without further delay.

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<sup>5</sup> Joint Petition at 3-5.

<sup>6</sup> 2003 TCPA Order at 14064 ¶ 83.

Indiana and Wisconsin also have engaged in vigorous publicity campaigns that portray preemption by this Commission as an attack upon the interests of Indiana and Wisconsin consumers. Indiana's anti-preemption campaign has been especially aggressive: that State's Attorney General has urged Indianans to demand that their banks withdraw support for the CBA petitions, and made a recent network television appearance to denounce the many reputable companies and organizations that have, at this Commission's invitation, petitioned for preemption of various state telemarketing laws.<sup>7</sup> Even more remarkably, the Indiana legislature has enacted a bill that makes compliance with Indiana's telemarketing laws a precondition for doing business with the State, *even if those laws are preempted by this Commission*.<sup>8</sup>

The CBA does not, of course, question the right of the governments and citizens of Indiana and Wisconsin to oppose the pending requests for preemption: but the longer the Commission delays its decision on those requests, the longer consumers in those states will be subjected to rumor and misinformation concerning the adequacy of federal law to protect their rights. Accordingly, the Commission's resolution of these petitions should not be further delayed.

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<sup>7</sup> NBC Nightly News Transcript, *Telemarketers Fight Back against Federal 'Do-Not-Call' List*, (July 21, 2005). As the title of the segment indicates, this news program conveyed the misimpression that requests for preemption of *state* telemarketing rules were in fact an attack on *all* do-not-call requirements, including those mandated by federal law. Indiana Attorney General Steven Carter, for his part, warned on the program that "[i]f you let everybody that people have done business with start calling again, it's going to mean hundreds of thousands of phone calls over the next several months." Mr. Carter did not explain the basis, if any, for this alarming prediction.

<sup>8</sup> See new Indiana Code Sec. 5-22-2-1.3, stating that a "prospective contractor may not contract with a governmental body unless the prospective contractor includes the following certifications as terms of the contract with the governmental body . . ." The required certifications include that the "contractor will not violate the terms of IC 24-4.7 [of Indiana's telemarketing law] for the duration of the contract, even if IC 24-4.7 is preempted by federal law." Prospective contractors also must certify that they have not violated Indiana's telemarketing law for the preceding 365 days, even if that law is preempted. *Id.*

## **CONCLUSION**

The Commission should, after consideration of a full record, declare its plenary jurisdiction over interstate telemarketing as the Joint Petition requests. The record on the pending CBA petitions, however, is complete and requires no further public comment or consideration. After eight months of Commission proceedings and growing public controversy, it is past time for those petitions to be granted.

Respectfully submitted,

/s/ Charles H. Kennedy

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Dated: July 29, 2005

## **CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2005, a copy of the foregoing **COMMENTS** was served by electronic mail, or U.S. First Class mail, as indicated, upon the following:

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